



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Krump/Walsh, A Joint Venture

File: B-256758

Date: May 2, 1994

Cyrus E. Phillips, IV, Esq., Keck, Mahin & Cate, for the protester.

Robert B. Flaig, Esq., Sheppard, Mullin, Richter & Hampton, for Kajima Engineering & Construction, Inc., an interested party.

Thomas Hawkins, Esq., General Services Administration, for the agency.

Adam Vodraska, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Low bid which contained no descriptive literature for a brand name or equal component of an alternative bid item cannot be rejected as nonresponsive because the IFB failed to effectively require descriptive literature for evaluation purposes and the low bidder was bound to perform in accordance with the IFB.

2. A solicitation requirement that bidders submit a list of related contracting experience does not constitute a definitive responsibility criterion, compliance with which is subject to the General Accounting Office's review.

DECISION

Krump/Walsh, A Joint Venture, protests the proposed award of a contract to Kajima Engineering & Construction, Inc., under invitation for bids (IFB) No. GS-09P-94-KTC-0016, issued January 24, 1994, by the General Services Administration (GSA) for construction of a new United States courthouse and federal building in Reno, Nevada. The protester, the second low bidder, asserts that Kajima's low bid is nonresponsive because it did not include descriptive literature on a brand name or equal component of a wiring system under an alternative bid item. The protester also alleges that Kajima's listing of its previous contracting experience failed to meet a definitive responsibility criterion and that disclosure of Kajima's financial information was

improperly withheld. This decision is made under our express option procedures. 4 C.F.R. § 21.8 (1993). Award has been withheld pending our decision.

We deny the protest in part and dismiss it in part.

The IFB requested a base bid and bids for six alternates, including alternate 1, a "universal wiring system" in lieu of the hardwire conduit system specified in the base bid statement of work.¹ Section 16114 of the IFB specifies Communications Integrators, Inc., "or approved equal," as an acceptable manufacturer of the Duolink Series 2100 Cable Tray/Raceway, a component of the universal wiring system. The E9.00 series of drawings included with the IFB depicts details of the universal wiring system. Note 3 on drawing E9.01 states that the "[c]ontractor shall submit product data, literature with alternate bid at time of bid"

In its bid, Kajima did not list the product it intended to use as the cable tray/raceway in the universal wiring system. Krump/Walsh alleges that Kajima's failure to submit descriptive literature renders Kajima's bid nonresponsive.²

While the IFB requires a brand name or equal component under alternate 1, it does not contain the standard descriptive literature clause that is required by Federal Acquisition Regulation (FAR) § 14.201-6(p)(1) when descriptive literature is necessary for bid evaluation purposes. The FAR requires that where descriptive literature is needed for bid evaluation purposes, the contract file must set forth the reasons why product

¹According to the agency report,

"The universal wiring system is a modular, flexible wiring system consisting of a combination power, data, and communications distribution tray system. It is a desirable alternative to the hardwire conduit system specified in the base bid because it permits increased flexibility in the use of office space by minimizing the time and disruption associated with installation of new power, telephone and data outlets."

²Of the 11 firms submitting bids, only the protester and 1 other firm submitted descriptive literature relating to the universal wiring system component.

acceptability cannot be determined without submission of such literature, and the IFB must:

"Clearly state (i) what descriptive literature is to be furnished, (ii) the purpose for which it is required, (iii) the extent to which it will be considered in the evaluation of bids, and (iv) the rules that will apply if a bidder fails to furnish the literature before bid opening or if the literature furnished does not comply with the requirements of the invitation." FAR § 14.202-5(d)(1).

Since the IFB did not provide what the literature would be used for, the extent to which it would be considered, or the applicable rules if a bidder failed to submit the literature, the IFB failed to effectively require descriptive literature, and Kajima's failure to submit such data with its bid does not render its bid nonresponsive. National Elec. Constr., Inc., B-245943, Jan. 22, 1992, 92-1 CPD ¶ 102. Literature that is not needed for bid evaluation generally is considered informational only, and failure to furnish it does not prevent acceptance of a bid where the bidder would be otherwise bound to perform in accordance with the IFB. Id. We see nothing to indicate that Kajima's bid for alternate 1 is anything other than an unequivocal offer to provide what was called for in the IFB, such that acceptance of the bid will bind the firm in accordance with the solicitation's material terms and conditions. Consequently, this aspect of the protest is denied.

The IFB also required the submission of bidding forms for "Related Contracting Experience" requesting the bidder to indicate "any previous contracting experience which demonstrates your firm's ability to successfully complete the work described in the above-referenced solicitation." The protester asserts that this solicitation requirement constitutes a definitive responsibility criterion which Kajima failed to meet. We disagree.

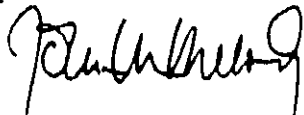
A determination that a bidder or offeror is capable of performing a contract is based, in large measure, on subjective judgments which generally are not susceptible of reasoned review. Thus, an agency's affirmative determination of a contractor's responsibility will not be reviewed by our Office absent a showing of possible fraud or bad faith on the part of procurement officials, or that definitive responsibility criteria in the solicitation may have been misapplied. 4 C.F.R. § 21.3(m)(5); King-Fisher Co., B-236687.2, Feb. 12, 1990, 90-1 CPD ¶ 177. Where there is no showing of possible fraud or bad faith, or that the definitive responsibility criteria have been misapplied, we have no basis to review the protest. We have defined

"definitive responsibility criterion" as "a specific standard, i.e., qualitative and quantitative, that is established by a procuring agency in a solicitation to measure a bidder's ability to perform a contract." Teltara, Inc., B-245806.2, Apr. 14, 1992, 92-1 CPD ¶ 363.

Clearly, the information requested by GSA on "any previous contracting experience" (emphasis added) is only general in nature and not sufficiently specific and objective to be characterized as a definitive responsibility criterion. The requested statement of experience merely provides the agency with general information relevant to the bidder's ability to perform the contract, that is, its responsibility. Id. Kajima supplied the requested information, indicating its involvement with a variety of construction projects, and insofar as this information is to be used by the contracting officer to affirmatively determine Kajima's responsibility, it is not subject to our review. We dismiss this part of the protest.

On April 11, 1994, Krump/Walsh amended its protest to complain that Kajima's completed GSA Form 527, Contractor's Qualifications and Financial Information, submitted with Kajima's sealed bid, was improperly withheld from the protester, and that this restriction on public disclosure rendered Kajima's bid nonresponsive. Contrary to Krump/Walsh's argument, however, Kajima's bid contained no restriction of any kind regarding financial information. Only where a bidder provides information with its bid that reduces, limits, or modifies a solicitation requirement may the bid be rejected as nonresponsive. Collins Siding Co., B-245732.2, May 12, 1992, 92-1 CPD ¶ 439. In any case, the financial information on the GSA Form 527 only relates to Kajima's responsibility; any restriction on its disclosure thus would not render its bid nonresponsive.

The protest is denied in part and dismissed in part.


 Robert P. Murphy
 Acting General Counsel